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# The role of Article 53 of the Charter in the EU legal order

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## Introduction

Article 53 of the Charter of Fundamental Rights of the European Union<sup>1</sup> is one of the general, horizontal provisions governing the interpretation and application of the Charter and dictates as follows :

*"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms a recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."*

The reference Article 53 makes to the Member States' Constitutions raises the question whether the Charter could constitute a threat towards the principle of primacy of EU Law, one of the pillars of the "new legal order" of the Community<sup>2</sup>, and what is the role of this provision within EU law.

Aim of this paper is to expose the main perspectives expressed regarding this question on the role and legal value of Article 53 of the Charter and how the Court of Justice of the European Union<sup>3</sup> positioned itself by delivering its Melloni and Åkerberg judgments in February 2013.

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1 Hereinafter just the Charter or EUCFR.

2 Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.40 and Case 6/64, Costa v ENEL, [1964] ECR 585 (establishing the principle) and Case 11/70, Internationale Handelsgesellschaft, [1970] ECR 1125.

3 Hereinafter just the Court or CJEU.

# 1. The initial readings of Article 53

## 1.1 A provision of "extremely limited legal significance" ?

Article 53 of the Charter with its reference to the Member States' constitutions gave rise to the theory that it could trigger a chain reaction leading to the compromise of principle of supremacy. The hypothesis was that it would be possible for national courts to rely on Article 53 and argue that nothing should restrict or adversely affect the level of protection afforded by national constitutions. It would then be possible for national courts to assess measures of the Community (a directive or a regulation for example) through the prism of their constitution and declare them inapplicable in their own jurisdictions, if they reach the conclusion that these Community measures contradict national human rights norms providing a higher level of protection than their Charter equivalent rights.

This hypothesis has been rejected by *Jonas Bering Liisberg* in his paper "*Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law ?*". Liisberg argues that Article 53 of the Charter might very well be of "extremely limited legal significance"<sup>4</sup> and certainly does not empower the CJEU to apply national constitutional norms above Community Law, nor does it allow to the national courts of a Member State to refuse the application of Community legislation that conflicts with their constitution<sup>5</sup>.

Liisberg established his argument on the drafting history of Article 53 and after comparative analysis of similar provisions in other documents, and especially Article 53 of the European Convention on Human Rights<sup>6</sup>. Regarding the drafting history of

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4 Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.42

5 Ibid.

6 Hereinafter ECHR.

the Charter Liisberg points out that in earlier versions of Article 53 there was a mention to "national law". This reference raised concerns, regarding the principle of supremacy, to the Commission, the Council and Members of the Charter Convention who decided to pivot to a reference to the "constitutions of the Member States" and later add the clause "in their respective fields of application"<sup>7</sup>.

For the Members of the Charter Convention, the Commission and the European Parliament<sup>8</sup> Article 53 had a major political significance : to make absolutely clear that the Charter would not usurp the role of the Member States' Constitutions or in Liisberg's words "*(Article 53) It is a politically useful inkblot meant to serve as an assurance to Member States, and eventually the electorate, that the Charter does not replace national constitutions and that it does not, by itself, threaten other, better or different human rights.*"<sup>9</sup>.

This concern of the Member States, that the Charter could be used in a way that would marginalize their national constitutions, is also pointed out by *Lenaerts* who mentions that some Member States feared that the Charter of Fundamental Rights would be used by the Court as a "federalizing device" that would introduce a common European standard for Fundamental Rights that would replace the definitions found in national constitutions<sup>10</sup>. The author cites the Opinion of Advocate General Sharpston in the *Zambrano* case and draws a parallel with the US where the Supreme Court extended the reach of several rights enshrined in the Constitution's First Amendment to individual states after its *Gitlow v New York* Judgment<sup>11</sup>

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7 Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.41.

8 Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.41.

9 Ibid, p.57.

10 Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review*, 8: 375-403, 2012, p.376.

11 Ibid, Opinion of AG Sharpston, delivered on 30 September 2010, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, ECLI:EU:C:2010:560, paras. 172 and 173.

Article 53 of the ECHR reads as follows :

*"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."*

Liisberg proceeds to analyze the case law of the European Court of Human Rights<sup>12</sup> in relation to Article 53 ECHR in order to draw conclusions regarding the place Article 53 of the Charter might have in the legal order of the Community. One of the cases the author focuses his attention on is the *Open Door Counseling* case<sup>13</sup>, where the Irish government resorted to Article 53 ECHR to argue that Article 10 of the ECHR, on freedom of expression, should not be interpreted in a way that would restrict the right to unborn life guaranteed by the Irish constitution. The ECtHR rejected the argument put forward by the Irish government and applied the doctrine of margin of appreciation, finding an infringement of Article 10 ECHR. This refusal of the ECtHR to use Article 53 ECHR as a "best protection" provision illustrates that Article 53 ECHR should be understood as a "maximisation clause" reflecting the spirit of the ECHR (and the Charter) which is to ensure a minimum standard of protection<sup>14</sup>. Liisberg concludes that Article 53 of the Charter and Article 53 ECHR are identical when it comes to their legal significance<sup>15</sup>. Similar to Liisberg, Van de Heyning also states that Article 53 of the Charter should only be read as a minimum standard clause and that the case-law of the ECtHR on article 53 ECHR "implies a modest future for its EU Charter equivalent"<sup>16</sup>.

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12 Hereinafter ECtHR.

13 *Open Door and Dublin Well Woman v Ireland*, (14234/88) [1992] ECHR 68 (29 October 1992)

14 Groussot, X. and Olson, I., (2013) Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?- The Judgments in *Åkerberg and Melloni*, Vol II LSEU, pp7-35, p.21.

15 Jonas Bering Liisberg "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2001) Jean Monnet Working Paper 4/01, p.57.

16 Groussot, X. and Olson, I., (2013) Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?- The Judgments in *Åkerberg and Melloni*, Vol II LSEU, pp7-35, p.21, C.Van De Heyning, "No Place Like Home : Discretionary space for the domestic protection of fundamental rights", in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Intersentia, 2011), p.71.

## 1.2 A "stand-still" clause.

CJEU President Koen Lenaerts argues that Article 53 of the Charter should be interpreted as a "stand-still" clause. A non regression clause that would prevent any reduction to the level of protection of fundamental rights in the legal order of the Union<sup>17</sup>.

Lenaerts supports that the interpretation of Article 53 of the Charter as a "stand-still" clause is the only one that ensures that the EU legal order will be autonomous. What leads Lenaerts to this conclusion is a combined reading of Article 52 (3)<sup>18</sup> and Article 53 of the Charter that shows that if the ECtHR decides to increase the level of protection of a fundamental right, or expand its scope of application, in a way that would overtake the level of protection guaranteed by EU Law, then the independence and autonomy of the European legal order would be under an existential threat. The interpretation of Article 53 as a "stand-still" clause preserves the constitutional autonomy of EU law<sup>19</sup>. The explanations relating to the Charter also point towards the thesis of Lenaerts since, regarding article 53, they state that *"this provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law"*<sup>20</sup>, with "currently" being the key word, as it refers to the time when the Charter became binding under EU law (1<sup>st</sup> of December 2009).

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17 Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review*, 8: 375-403, 2012, p.402.

18 Article 52 (2) of the Charter reads as follows : *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by as the said Convention. This provision shall not prevent the Union law providing more extensive protection."*

19 Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review*, 8: 375-403, 2012, p.395.

20 "The explanations relating to the Charter", OJ[2007] C 303/17, p.19.

### **1.3 Article 53 through the spectrum of constitutional pluralism.**

The concept of constitutional pluralism is not strictly defined. There are several different understandings of it, provided by several academics. The underlying theme of the views presented here is that constitutional pluralism in the European legal order, constitutes an exchange of opinions, a dialogue between the CJEU and the national courts of the Member States, where both sides are contributing arguments in relation to the interpretation of fundamental rights, transcending the hierarchical structure that would place the European Court on top of this relationship and advancing to what resembles a discussion among equals.

The idea that was expressed earlier, that Article 53 was introduced as a reassurance for the Member States that the Charter will not replace their constitutions and does not have any greater legal significance is controverted by several academics who argue that there are different ways of interpreting Article 53.

Koen Lenaerts puts forward the thesis expressed by L. Azoulai, and considers it the most convincing. Azoulai argues that the aim of Article 53 is to strengthen the primacy of EU law by setting to the CJEU the obligation to analyze and expose the reasons it decided to depart or maintain the level of protection of fundamental rights granted by the constitution of a Member State. This mandate obliges the CJEU to engage in a dialogue with the national courts, making Article 53 an expression of constitutional pluralism<sup>21</sup>. Article 53 would not endorse the primacy of European legislation that does not take into account the common constitutional traditions of the Member States nor it would deprive from the European legal order its primacy in the name of a national constitution that might be offering a higher level of protection for a fundamental right in comparison with EU law, but completely fails to take into

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21 Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review*, 8: 375-403, 2012, p.398, citation "123 L.Azoulai, 'L' article II-113', in Burgorgue-Larsen, *supra* n.69, at p. 689".

account the main characteristics of that law<sup>22</sup>. Lenaerts argues that Article 53 should be interpreted bearing in mind the Court's judgments in the *Omega*<sup>23</sup> and *Sayn-Wittgenstein*<sup>24</sup> cases, where the Court established that it is possible to defer to the national courts the question of determining the level of protection of fundamental rights that would be consistent with their constitutions, when we have to do with national legislation implementing EU law and the essential interests of Union law are not affected<sup>25</sup>.

A similar approach is adopted by Aida Torres Pérez<sup>26</sup>. She argues that an interpretation of Article 53 that would give content to it, without clashing with the principle of supremacy, would be that this provision operates as a mandate towards the Court, to use the Charter with self-restraint<sup>27</sup>. The CJEU should defer to the national courts when the level of protection of a fundamental right is higher under the national constitutional order and there are no other rights or interests regulated under EU law that should prevail. This self-restraint shown by the Court would allow for diverse interpretations of a fundamental right<sup>28</sup>.

According to Torres Pérez in the area of rights interpretation the CJEU should pursue a synthesis of opinions and engage in dialogue with the national courts. This comparative reasoning, as she states, will lead the Court at interpretations of fundamental rights that better echo the Community as a whole, plus it will justify following the CJEU's fundamental rights adjudication<sup>29</sup>. There is of course the very probable scenario where the level of protection provided for by the European legal order falls short in relation to the one guaranteed by a national constitution. For her,

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22 Ibid.

23 Case C-36/02 *Omega* [2004] ECR I-9609.

24 Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13593.

25 Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review*, 8: 375-403, 2012, p.399.

26 Aida Torres Pérez "Conflicts of Rights in the European Union: A Theory of Supranational Adjudication", published to Oxford Scholarship Online: September 2009.

27 Ibid, p. 176.

28 Ibid.

29 Ibid.

the idea that this potential conflict should be resolved on the basis that the relation between the CJEU and the national courts is a hierarchical one, with the European Court on top having the final say, is not accurate to the nature of EU law<sup>30</sup>.

For Torres Pérez the main question is not necessarily whether we should have a uniform or diverse interpretation of fundamental rights in the EU legal order. Both approaches have their advantages, uniform interpretation for example enhances the efficiency and uniform application of EU law and guarantees equality across the Union<sup>31</sup>, while a more diverse approach would secure democratic self-government of the Member States and their constitutional identity<sup>32</sup>. The challenge lays on the path we will choose in order to find the answer. For her the idea of a hierarchical imposition of CJEU's standards has no legitimacy<sup>33</sup>. The consensus should be reached through dialogue between the national courts and the CJEU, advancing the reasoning of the Court's decisions and showing equal respect to the constitutional traditions of the Member States.

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30 Ibid, p. 70.

31 Ibid, p. 77.

32 Ibid, p. 83.

33 Ibid, p. 92.

## 2. The CJEU's perspective

### 2.1 The Melloni and Åkerberg judgments.

#### 2.1.1 *Melloni*

The CJEU with its Melloni<sup>34</sup> and Åkerberg<sup>35</sup> judgments in February 2013 took a major step in interpreting Article 53 of the Charter and defining its role within the legal order of the European Union.

The *Melloni case* concerned an Italian citizen, Stefano Melloni, who was arrested in Spain after the Italian authorities issued a European Arrest Warrant<sup>36</sup>. The Spanish authorities (Criminal Division of the High Court) approved his extradition to Italy and released him on bail. Mr Melloni after providing the bail, fled so he would not be surrendered to the Italian authorities<sup>37</sup>.

The criminal proceeding against Mr Melloni began without his presence on March 27, 1997 and the Italian Court directed that any notice should be given to the lawyers Mr Melloni appointed to represent him during the proceedings. In the Court of First Instance Mr Melloni was convicted, in absentia, to ten years imprisonment for bankruptcy fraud. This decision was confirmed by the Court of Appeals and finally on June 7, 2004, the Supreme Court of Cassation of Italy dismissed an appeal lodged by Mr Melloni's lawyers making his conviction final and irrevocable<sup>38</sup>.

The Italian authorities issued an EAW for the execution of the sentence imposed on Mr Melloni. The Spanish authorities apprehended Mr Melloni in 2008,

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34 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107.

35 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013], ECLI:EU:C:2013:105.

36 Hereinafter EAW.

37 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107, para. 13.

38 *Ibid*, para. 14.

but he tried to combat the EAW and his extradition to Italy by filing a petition for constitutional protection before the Constitutional Court of Spain. He claimed that his extradition to Italy would be in violation of his rights under the Spanish constitution, since under Italian law it would be impossible for him to appeal against the Italian court decision that convicted him in absentia<sup>39</sup>.

The Constitutional Court of Spain found that the extradition of a person from Spain to a country where he or she would not have the right to appeal a decision of conviction in absentia, would be in violation of the interpretation the Spanish Constitutional Court gave to right to a fair trial<sup>40</sup>. In light of this the Spanish Court asked for a preliminary ruling by the CJEU and referred to it three questions. The third and final question concerned Article 53 of the Charter and specifically whether this Article permits Member States to apply their constitutional rights when they provide a higher level of protection in relation to their Charter equivalent, contra to the principle of primacy of EU law<sup>41</sup>.

Advocate General Bot at his opinion in the Melloni case interprets Article 53 as meaning that *"it does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant subject to the condition that the person who is the subject of the warrant be entitled to a retrial in the issuing Member State, where the application of that condition is not authorized by Article 4a(1) of the Framework Decision"*<sup>42</sup>. For the Advocate General Article 53 of the Charter is of great political and symbolic value and it should be read in close conjunction with Articles 51 and 52 which it compliments<sup>43</sup>. He states that Article 53 supplements the values expressed in Articles 51 and 52 of the Charter, by

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39 Ibid, paras. 16-20.

40 Ibid, paras. 19, 20.

41 Ibid, para. 55 : "whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defense guaranteed by its constitution".

42 Opinion of Advocate General Bot, delivered on 2 October 2012, case C-399/11, ECLI:EU:C:2012:600, para. 136.

43 Ibid, para. 129.

pointing out that in the European legal order, a system where the pluralism of sources for the protection of fundamental rights prevails, the Charter does not aim to become the only instrument for the protection of those rights<sup>44</sup>. Article 53 with its function, supplementing Articles 51 and 52, makes clear that the Charter can not by itself cause the reduction of protection of fundamental rights in other legal orders<sup>45</sup>. It is clear then that the Charter can not obligate the Member States to lower the protection of constitutional rights in cases which fall outside the scope of EU law and that the Member States can not rely on the Charter to lower their national standards of fundamental rights protection in cases exclusively within the field of national law<sup>46</sup>.

The CJEU states that according to the referring court's interpretation, Article 53 of the Charter allows to the Member States to implement their national standards of protection of fundamental rights, when they are higher than the corresponding ones in the Charter and to give them priority over implementing EU law whenever it is necessary. This reasoning would make the compliance with an EAW issued for the execution of a sentence imposed in absentia, subject to conditions, by a Member State, with the intention to avoid an interpretation that would restrict or adversely affect the level of protection of fundamental rights in its constitution. Such conditions are not allowed under Article 4a(1) of Framework Decision 2002/584<sup>47</sup>.

The Court rejected the interpretation expressed above. Such an interpretation would undermine the principle of primacy of EU law which is an essential feature of the European legal order. The Court referred to settled case law in *Internationale Handelsgesellschaft*<sup>48</sup> and *Winner Wetten*<sup>49</sup> where it established "*that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness*

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44 Ibid, para. 131.

45 Ibid, para. 133.

46 Ibid, para. 134.

47 Case C-399/11 *Stefano Melloni v Ministero Fiscal* [2013], ECLI:EU:C:2013:107, para. 56.

48 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR1125, para. 3.

49 Case C-409/06 *Winner Wetten* [2010] ECR I-8015, para. 61.

*of EU law on the territory of that State*"<sup>50</sup>.

In paragraph 60 of its judgment the CJEU recognizes that under Article 53 of the Charter the Member States are free to apply national standards of fundamental rights protection when implementing EU law, as long as the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not compromised<sup>51</sup>.

The Court then clarifies that the adoption of Framework Decision 2009/299 aimed to harmonize the conditions for the execution of an EAW, in the EU legal order, in the case of a conviction rendered in absentia. This harmonization was the result of a consensus reached by all Member States regarding the scope that should be given to the procedural rights of persons who were subjects to an EAW and were convicted in absentia<sup>52</sup>. So if a Member State had the possibility to make the execution of an EAW subject to constitutional review, in order to make sure that its national standards of fundamental rights protection would not be affected, a possibility not provided by the Framework Decision, that would compromise the uniformity of the level of protection of fundamental rights as defined in that Framework Decision and it would undermine the principles of mutual trust and recognition. These are the principles the Decision aspires to uphold, therefore if a Member State had such a possibility, that would undermine the efficiency of the Framework Decision<sup>53</sup>.

The conclusion of the Court in Melloni is that in the areas of EU law where there is full harmonization, Article 53 of the Charter does not offer the possibility to Member States to apply their national standards of protection provided for fundamental rights. But in situations that are not fully determined by EU law the

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50 Case C-399/11 *Stefano Melloni v Ministero Fiscal* [2013], ECLI:EU:C:2013:107, para. 59.

51 *Ibid*, para. 60.

52 *Ibid*, para. 62.

53 *Ibid*, para. 63.

Member States remain free to apply national standards, as long as the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. This is exactly the case in Åkerberg.

### 2.1.2 Åkerberg

The CJEU delivered its Melloni and Åkerberg judgments the same day, i.e. 26 of February, 2013. The main focus of the Åkerberg decision is Article 51(1) of the Charter, where the Court established that the provisions of the Charter are addressed to the Member States in every situation that falls within the scope of EU law, giving a wider interpretation to Article 51(1) that states that *"The provisions of this Charter are addressed... to the Member States only when they are implementing Union law"*<sup>54</sup>. In relation to Article 53 of the Charter, the Court repeats the interpretation it gave to it in the Melloni judgment.

Mr Åkerberg Fransson faced proceedings in front of administrative courts in Sweden for tax evasion and for failing to declare employers' contributions, for the fiscal years 2004 and 2005. The conduct of Mr Åkerberg led to a significant loss of revenue for the Swedish state and for the exposed social security bodies. The administrative courts imposed penalties upon Mr Åkerberg for the violation of his tax and employer obligations<sup>55</sup>. On the basis of the same facts (tax evasion) criminal proceedings were brought against Mr Åkerberg, who claimed that this resulted to a violation of the 'ne bis in idem' principle and of his rights under Article 4 of Protocol No 7 to the ECHR and Article 50 of the EUCFR<sup>56</sup>.

The CJEU establishes that there is a clear mandate in EU law towards the Member States to protect the financial interests of the Union and take every essential

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54 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013], ECLI:EU:C:2013:105, para.19.

55 Ibid, para.12.

56 Ibid, paras. 13,14.

measure in order to ensure the collection of Value Added Tax (VAT) in their territories and to prevent tax evasion<sup>57</sup>. The Member States are free to determine the nature of the measures they need to adopt in order to comply with the obligation that is placed upon them, under Union law. It is therefore an area of EU law not fully harmonized, thus the Member States have the liberty to act as they see fit<sup>58</sup>. The imposition of tax penalties and the initiation of criminal proceedings for tax evasion are the measures the Swedish legislators considered necessary in order to comply with the State's obligations under EU law.

The CJEU in paragraph 29 of the Åkerberg judgment states the following : *"That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter; national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR, paragraph 60)".* The Court refers to the Melloni judgment and states that in cases where the actions of the Member States are not fully dictated by Union law, the national courts are free to apply national standards of fundamental rights protection, insofar the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. It is therefore upon the Swedish courts to decide whether the combination of tax and criminal penalties that is provided for by national law is within the boundaries set by the national level of protection of fundamental rights. The national court might find that this combination is in breach of the national standards, in which case the remaining penalties must be "effective, proportionate and

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<sup>57</sup> Ibid, para. 25.

<sup>58</sup> Ibid, paras. 25-28.

dissuasive"<sup>59</sup>.

## **2.2 The impact of Melloni and Åkerberg.**

### **2.2.1 An optimistic assessment.**

The Melloni and Åkerberg judgments have caused reactions of both disappointment and optimism, for the direction the the CJEU has decided to follow in relation to level of protection of fundamental rights in the Union and the relation and dialogue with national courts.

The more optimistic assessments see the Court taking a different approach when it comes to Article 53, and refuse to view it as a 'non regression clause', a 'best protection' or a 'co-existence' clause<sup>60</sup>. Instead the CJEU uses Article 53 to allow the national courts to use their national standards of protection of fundamental rights in an area of law where we do not have full harmonization among the Member States, like in the Åkerberg case. Where the action of the State is entirely determined by EU law then the national courts can not rely on national standards of protection, like in the Melloni case.

This point of view is shared by *Bruno de Witte* who claims that, although some might find that the primacy-conform interpretation of Article 53 given by the court seems to deprive it of any meaning, actually, not only it is the correct one but also leaves a meaningful legal role for Article 53<sup>61</sup>. For him the decisions in Melloni and Åkerberg are the confirmation that national protection of fundamental rights is

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59 Ibid, para. 36.

60 Groussot, X. and Olson, I., (2013) Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?- The Judgments in Åkerberg and Melloni, Vol II LSEU, pp7-35, p.25.

61 Bruno de Witte, Article 53 –Level of Protection, in S. Peers, T. Hervey, J. Kenner and A. Ward, The EU Charter of Fundamental Rights –A Commentary, Oxford, Hart, 2014, p. 1533.

not displaced by the Charter, but that it can coexist with EU protection and supplement it, as long as it does not meddle with the effective application of EU law. Whenever EU law gives a degree of discretion to the Member States in the implementation of EU legislation, something that happens quite often according to De Witte, the Member State can apply national standards. Case in point the Åkerberg judgment<sup>62</sup>.

As *Xavier Groussot* and *Ingrid Olsson* point out, for the Member States to rely on national levels of protection of fundamental rights (in an Åkerberg type situation) there are two cumulative conditions that must be met. First, the level of protection provided for by the Charter can not be infringed. The national courts can only rely on provisions of national law that provide a higher level of protection than the Charter. For the authors the level of protection condition could cause some problems since in practice it is creating a complex system of protection of fundamental rights. Second, the primacy, unity and effectiveness of EU will not be compromised<sup>63</sup>.

For Groussot and Olsson the Court's interpretation of Article of the Charter provides us with a new test regarding the application of fundamental rights in Member States actions falling within the scope of EU law, and establishes a 'solid bridge' between the national and the Charter's standards of protection of fundamental rights. The CJEU makes clear that Article 53 should not be viewed as a mere 'non-regression' clause, but it goes further and can be now viewed as a 'pluralist' clause or a 'best protection' clause, under some conditions. The authors describe the approach of the Court on the matter of Article 53 as Janusian, *"On the one hand, it reflects the pluralist nature of EU law by recognizing the cumulative application of several layers of fundamental rights binding Member States. On the other hand, it strongly protects the level of protection of the Charter and the effectiveness and uniformity of*

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62 Ibid, p. 1533, 1534.

63 Groussot, X. and Olson, I., (2013) Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?- The Judgments in Åkerberg and Melloni, Vol II LSEU, pp7-35, p. 25.

*EU law*"<sup>64</sup>. De Witte also acknowledges that the Court is faced with a 'duty of pluralist interpretation'. The CJEU has to show in its judgments that it is conducting an examination of the national constitutional laws of the Member States and should take notice of the meaning the national courts give to fundamental rights<sup>65</sup>.

### **2.2.2 A not so optimistic assessment.**

While, as we saw above, the Melloni and Åkerberg judgments are viewed as an important step forward by the Court, reflecting the pluralist nature of EU law and enhancing the dialogue between the CJEU and national courts, there is another side to the coin. The side that is disappointed by the position the Court took, and considers, especially the Melloni decision, a missed opportunity for the advancement of judicial dialogue in the European legal order.

This disappointment is expressed by *Leonard F.M. Besselink*<sup>66</sup> who views the Melloni judgment as a clear sign that the Court, in the name of unity, primacy and effectiveness of EU law, is willing to set aside even the core of citizens national constitutional rights. He also points out that the CJEU did not seem interested to truly engage in a judicial dialogue with the Spanish Constitutional Court<sup>67</sup>.

The Spanish Constitutional Court offered three interpretations, with its reference to the CJEU, regarding Article 53. According to the first one the Charter provides a minimum standard of protection for fundamental rights, above which the Member States are free to apply their own higher level of protection. The second interpreted Article 53 in relation with Article 51 and held that national constitutional law would be excluded where EU law applied, but confirms that in situations outside

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64 Ibid, p. 26.

65 Bruno de Witte, Article 53 –Level of Protection, in S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights –A Commentary*, Oxford, Hart, 2014, p. 1537.

66 Leonard F.M. Besselink, *THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER MELLONI*, *European Law Review*, August 2014, nr 3.

67 Ibid, p. 1.

the scope of European law the national standards can be relied upon. The third interpretation dictated that a choice should be made between the first two interpretations and the most suitable would be selected on the basis of the characteristics of the problem at hand, and the context in which the assessment for the level of protection should be made<sup>68</sup>.

The CJEU dismissed the interpretations given by the Spanish Constitutional Court and, in Basselink's words, 'cut the judicial dialogue short'. For him the Court seems to switch to a different 'mode' whenever it thinks that the principle of primacy of EU law might be interfered with<sup>69</sup>. The Court referred to settled case-law in *Internationale Handelsgesellschaft* and *Winner Wetten* where it had established that national rules, even of constitutional proportions, can not undermine the effectiveness of EU law. *Nik de Boer* shares the viewpoint that primacy was the sole criterion in interpreting Article 53 for the CJEU<sup>70</sup>. The fact that the Court's decision focused so much on the principle of primacy and did not refer to national constitutional law, signals that Melloni was a missed opportunity for the advancement of a more pluralistic era in the Court's jurisprudence<sup>71</sup>.

Basselink colorfully comments on the quality of the judicial dialogue on the part of the CJEU by referring to the remarks of a Spanish scholar : "...*the institutional empathy shown by the Court is equivalent to that of a potato*" and "*if there is any clear manifestation of deafness or the Asperger syndrome of the Court of Justice, it is this*"<sup>72</sup>. But the most obvious manifestation of the Court's failure to engage in a meaningful exchange with the Spanish Constitutional Court, was the

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68 Nik de Boer, Addressing rights divergences under the Charter: Melloni, *Common Market Law Review* 50: 1083–1104, 2013, p. 1087.

69 Leonard F.M. Besselink, THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER *MELLONI*, *European Law Review*, August 2014, nr 3, p. 16.

70 Nik de Boer, Addressing rights divergences under the Charter: Melloni, *Common Market Law Review* 50: 1083–1104, 2013, p. 1091.

71 *Ibid*, p. 1101.

72 Leonard F.M. Besselink, THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER *MELLONI*, *European Law Review*, August 2014, nr 3, p. 23, citations 65 and 66.

denial of the latter to accept CJEU's interpretation of Article 53. The Spanish Court eventually lowered its constitutional standards of protection, basing its decision on a provision of the Spanish constitution<sup>73</sup>, thus avoiding a conflict with the CJEU. The national court though made clear that in the unlikely event, of a violation of the Spanish constitution by EU law, if this hypothetical conflict is not resolved by the channels provided for by the European legal order, the Constitutional Court would have to respect the principle of popular sovereignty and its expression in the Spanish constitution. A clear message intended for the Court of Justice, calling it to adopt a position more sensitive towards the national constitutional values of Member States<sup>74</sup>.

Finally, Aida *Torres Pérez* describes the judgment of the Spanish Constitutional Court, and final act of the Melloni case, as 'anti-climactic'. According to her, the national court adopted a defensive stance and denied to engage in a dialogue with the CJEU. In its effort to present its change of heart regarding the interpretation of the right to fair trial for persons convicted in absentia, as a decision reached on its own motion, the Spanish court focuses on the national constitution and considers the preliminary ruling issued by the CJEU just an interpretation tool, thus failing to recognize *'the specific nature of EU law and the obligations that came with the preliminary reference'*<sup>75</sup>.

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73 Ibid, p. 23, Art.10(2) Spanish Constitution : “the norms concerning fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and with international treaties and agreements on the same matter ratified by Spain”.

74 Ibid, p. 24.

75 Aida *Torres Pérez*, Melloni in Three Acts : From Dialogue to Monologue, *European Constitutional Law Review*, 10: 308–331, 2014, p. 319-323.

## 3. Commentary

### 3.1 What is the role of Article 53 of the Charter ?

It is clear now that the Court of Justice did not consider Article 53 of the Charter an inkblot, with no real legal value and just a political compromise. It also held that Article 53 should have a more "kinetic" role in the Union legal order, than a mere stand-still clause.

In describing the interpretation of Article 53 given by the Court, I find the term Janusian, used by *Xavier Groussot* and *Ingrid Olsson*<sup>76</sup> to be truly fitting. Like the ancient Roman god Janus, the Court's approach seems to have a duality in its nature, it is facing at the same time towards the future and the past of European law. When facing towards the future Article 53 is a reflection of the pluralistic nature of EU law. A reflection of the different levels of protection of fundamental rights within the Union, that bind Member States at a national and supranational level. Article 53 mandates the CJEU to take into account the diverse viewpoints of the different Member States regarding the level of protection, the scope and meaning of fundamental rights in their constitutions, before adjudicating in this sensitive area of law. This will not only create solutions that are stemming from the common constitutional traditions of the Members of the Union, but it will enhance the legitimacy of the CJEU's adjudication in fundamental rights<sup>77</sup>.

While one face of the Court's interpretation of Article 53 looks to a pluralistic future for fundamental rights adjudication in the EU, the other looks to the past, and the principle of primacy of EU law. The CJEU makes sure that what it established in

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76 Groussot, X. and Olson, I., (2013) Clarifying or Diluting the Application of the EU Charter of Fundamental Rights?- The Judgments in *Åkerberg and Melloni*, Vol II LSEU, pp7-35, p.26.

77 Aida Torres Pérez "Conflicts of Rights in the European Union: A Theory of Supranational Adjudication", published to Oxford Scholarship Online: September 2009, p. 176.

the previous years with its case law, i.e. the principle of primacy of EU law, will not be interfered with. In its interpretation the Court states that the higher national standards of protection provided for fundamental rights, will apply only where Union law does not fully dictate the actions of the Member States and under the conditions that the level of protection provided for by the Charter, the primacy, unity and effectiveness of European law will not be compromised. It is clear that the meaning enshrined by the Court of Justice to Article 53 is that it can be used to advance the judicial dialogue between the European and the national courts, and allow for higher national levels of protection for fundamental rights to apply, under the strict term that the level of protection of the Charter and the principle of primacy of EU law will not be undermined, even if, like in the Melloni case, we have secondary European legislation contradicting a national constitution.

### **3.2 Could Article 53 be more ?**

Although the Court, with its interpretation on Article 53 of the Charter, tries to achieve a balance between pluralism and primacy of EU law, safeguarding the principle of primacy seems to be the core priority.

The CJEU with its Melloni and Åkerberg judgments established that the application of higher national standards of protection for fundamental rights can only be applied in legal fields where the actions of the Member State are not fully dictated by EU law (not fully harmonized areas of law), under the conditions that the primacy, unity and effectiveness of EU law and the level of protection provided for by the Charter will not be compromised. It is therefore impossible for Member States' authorities to rely on higher national standards of protection for fundamental rights, if this means deviating from secondary EU legislation with the aim to fully harmonize the relevant area of law across the Union. From my perspective this seems to be

problematic.

Harmonization is an essential instrument in the effort to accomplish the Union's aspirations. Through the process of harmonization a concept created in a European level has the potential to be developed into a common EU law. Objective of the harmonization process is to create a law as uniform as it is needed in order to achieve the Union's goals. Equally important is to achieve a common application of the adopted concept throughout the EU<sup>78</sup>. One of the main objectives of the EU, the establishment of the common internal market, relies on this process to remove the obstacles generated by the differences in the legal orders of the Member States, and create a harmonized legal frame across the Union<sup>79</sup>. In the context of the economic goals of the Union (common market, free movement of persons and goods, competition) it makes sense not to allow any derogation from the application of the harmonizing EU legislation. Aim of harmonization is to overcome the differences found in the legal orders of the Member States, so providing them with the possibility to derogate would defeat the very purpose of the process.

The adoption of the approach expressed above could be problematic when we operate in the field of fundamental rights. As we saw above in the Melloni case, Framework Decision 2009/299, secondary EU legislation with the aim to harmonize the conditions for extradition of persons convicted in absentia, contradicted the interpretation given to the right to fair trial by the Spanish Constitutional Court. The CJEU ruled that the higher standards of protection provided for by the interpretation of the Spanish Constitutional Court could not apply, since this would undermine the primacy, unity and effectiveness of EU law. The Court stated that the concept expressed in the EAW Framework Decision is the result of a consensus reached by all Member States. Making the execution of an EAW subject to constitutional review

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<sup>78</sup> Eva J. Lohse, "The Meaning of Harmonization in the Context of European Union Law – a Process in Need of Definition", *Theory and Practice of Harmonization* (2012), edited by Mads Andenas & Camilla Baasch Andersen, Edward Elgar Publishing, chapter 16.

<sup>79</sup> *Ibid.*

would compromise the uniformity of the level of protection of fundamental rights as defined in that Framework Decision and it would undermine the principles of mutual trust and recognition among the Member States<sup>80</sup>.

It is crucial to bear in mind that the EAW Framework Decision is an act of an institution of the executive branch of the Union, the Council, and that the consensus reached by the Member States in order to achieve the harmonization objective of the EAW Framework Decision, was agreed upon by the national governments, not the parliaments of the Member States<sup>81</sup>. As *Basselink* comments :"*With regard to executive acts, one might expect a stronger judicial protection and closer judicial scrutiny than in the case of the products of legislatures with the direct democratic legitimacy of parliaments*"<sup>82</sup>. Granting to secondary legislation the major significance of harmonizing fundamental rights within the Union, bears the risk of blurring the line between the primary law nature of fundamental rights and secondary law as subject to this<sup>83</sup>. The fact that the national governments reached an agreement on the level of protection for a fundamental right does not mean that higher standards of protection at the national level should be excluded. Governments do not have the institutional capacity to interpret fundamental rights, something that is within the scope of competences of the legislative and judicial branch, and they should not be able to lower the national standard of protection of fundamental rights simply by agreeing on a European level<sup>84</sup>.

Under the conditions stated above EU legislation that harmonizes fundamental rights should not be immune to derogations. The interpretation of fundamental rights is a pivotal issue for every national legal order and in several cases it forms part of

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80 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107, para. 63.

81 Leonard F.M. Besselink, THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER *MELLONI*, *European Law Review*, August 2014, nr 3, p. 13

82 *Ibid.*

83 *Ibid.*

84 *Aida Torres Pérez*, *Melloni in Three Acts : From Dialogue to Monologue*, *European Constitutional Law Review*, 10: 308–331, 2014, p. 327

the constitutional identity of the Member State. The CJEU with its interpretation of Article 53 reserved a secondary role for the national courts, allowing their voices to be heard only in situations where EU law does not fully regulate the actions of the Member States, while no derogation is tolerated when we are faced with EU legislation aiming to fully harmonize fundamental rights. The meaning of this is that there is no room left for judicial dialogue, it is possible for the governments of the Members of the Union to reach a common European concept regarding fundamental rights, having completely circumvent the Judicial and Legislative branches of their States. This process lacks the necessary democratic legitimacy and could lead to a compromise of the level of protection of fundamental rights provided for by the national constitutions of Member States, across the Union. Due to these reasons the CJEU should provide an interpretation of Article 53 that would not exclude the viewpoint of national courts, but instead incorporate it in its decision making process when it is tasked with reviewing and enforcing legislation that harmonizes the interpretation of fundamental rights.

The repercussions of CJEU's approach in Melloni were not as harsh as they could have been. Firstly, the Spanish Constitutional Court had to take a step back from its interpretation of the right to a fair trial, but this did not necessarily lead to a compromise of the level of protection of fundamental rights in Spain. Secondly, the conflict between the national and the European court was avoided, at least for now.

As we have seen above, the Spanish Constitutional Court, after CJEU's response to its reference for a preliminary ruling regarding the Melloni case, moved away from its interpretation of the right to a fair trial for persons convicted in absentia, aligning with the interpretation provided by the EAW framework decision. Mr Melloni was aware of the trial proceedings that were initiated against him in Italy and he was represented in every stage of the process, from the Court of First Instance until the Supreme Court of Cassation of Italy, by attorneys that he appointed to

represent him. The fact that he has not present in person in these proceedings was a choice he made, in order to avoid serving his sentence, should he be convicted<sup>85</sup>. Under these conditions, granting Mr Melloni the right to appeal against the court decision that convicted him in absentia, just so he could be physically present in the court room, would be a step to far in protecting the right to a fair trial and it would disproportionately harm the effective operation of the criminal justice system. This does not mean that the approach of the CJEU was the correct one, and that national courts should abandon national standards of protection of fundamental rights every time they contradict European harmonizing legislation. The fact that Melloni caused little harm to the protection of fundamental rights, does not exclude it from happening in the future.

The Spanish Supreme Court eventually adopted an interpretation of the right to a fair trial for persons convicted in absentia, that was in line with the common European concept that was established in the EAW framework decision. The way it justified this choice though, clearly showed that it was not willing to accept CJEU's viewpoint on the matter. The Spanish Court based its judgment on provisions of the Spanish constitution and not on the basis of the argumentation provided by the CJEU, that national legislation even of constitutional proportions, can not compromise the primacy, unity and effectiveness of EU law. The national court in this instance made the choice not to engage in a confrontation with CJEU, but clearly stated that in a hypothetical future conflict between the national constitution and EU law, if the dispute is not resolved through the paths provided by the European legal order, the Constitutional Court would have to respect the principle of popular sovereignty and its expression in the Spanish constitution<sup>86</sup>.

The Spanish Constitutional Court is not the only major national court of a

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85 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107, paras. 13, 14.

86 Leonard F.M. Besselink, THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER *MELLONI*, European Law Review, August 2014, nr 3, p. 24.

Member State that is not keen to give up higher national standards of protection of fundamental rights every time they contradict EU law aimed to harmonize this legal field. Recently the German Federal Constitutional Court, with its Mr R. judgment reaffirmed what it had already established with previous case-law : that Union measures can be subject to review by the Federal Constitutional Court, to determine whether they infringe national constitutional principles that form part of the national constitutional identity of Germany (constitutional identity review)<sup>87</sup>. This case, similarly to Melloni, concerned the execution of an EAW issued by Italian authorities for the extradition of a U.S. citizen from Germany. The German Court recognized that in cases of an EAW the principle of mutual trust applies. But mutual trust among the Member States is not absolute and it can be shaken if the state issuing the EAW fails to fulfill the minimum constitutional standards required by the German constitution. So even though the EAW would, in the majority of the cases, take precedence over national law, German courts have to make sure that rights that are part of the national constitutional identity (in the Mr. R. case, the right of human dignity) will not have their level of protection compromised when the person who is subject to the EAW is extradited to the issuing state<sup>88</sup>.

The situation in fundamental rights protection in the EU could be characterized as a fragile truce. The national courts are not willing to follow CJEU's reasoning and give up national standards of protection every time there is a conflict with European harmonizing legislation. And they should not be. When it comes to fundamental rights the harmonization process needs to follow a path that includes judicial dialogue. After all the Union is under the obligation to respect the constitutional identity of every Member State, deciding on fundamental rights at an executive level is not in line with that. It is of vital importance then, that the CJEU will revalue its interpretation of Article 53 of the Charter, since staying in the path created after

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87 Julian Nowag, A new Solange judgment from Germany – or nothing to worry about?, <http://voelkerrechtsblog.org/a-new-solange-judgment-from-germany-or-nothing-to-worry-about/>.

88 Ibid.

Melloni, has the potential to lead it into a conflict with the national courts of the Member States.

What was stated above does mean that the CJEU should abandon the principle of primacy of EU law. The Court could be more conciliatory with its interpretation for Article 53, by stating that in exceptional cases, higher national levels of protection for fundamental rights could prevail at the expense of primacy and effectiveness of EU law. *Aida Torres Pérez* points at the *Omega* case to make the argument that the CJEU has already established that it is possible for the effectiveness and primacy of EU law to be compromised in order to protect a fundamental right that enjoys a higher level of protection in a Member State (in this case the principle of human dignity in Germany)<sup>89</sup>. The *Omega* case differs from *Melloni* and *Åkerberg*. The first is about whether a Member State can derogate from implementing primary EU law in order to safeguard the higher level of protection that a specific fundamental right enjoys under national law, while the second concerns secondary EU legislation aimed to harmonize an area of law across the Union. This difference can not justify why, in some cases, it is possible for a Member State to derogate from the application of EU primary law to ensure that the national level of protection will not be lowered, but when it is confronted with secondary legislation harmonizing fundamental rights this possibility does not exist, especially if we consider that when it comes to fundamental rights, the harmonization process seems to be lacking the necessary democratic legitimacy. The nature of fundamental rights differs drastically from the nature of the economic objectives that the EU set out to accomplish through the harmonization process. And while it makes sense not to be able to derogate from measures that, for example, aim to assist the establishment of the common market, fundamental rights are part of the nucleus of every legal order and most of them part of the constitutional identity of the state.

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<sup>89</sup> *Aida Torres Pérez*, *Melloni in Three Acts : From Dialogue to Monologue*, *European Constitutional Law Review*, 10: 308–331, 2014, p. 327.

Article 53 should be interpreted as mandating the Court to accept the application of higher national standards of protection for fundamental rights, even in areas of EU law that are harmonized, in exceptional occasions and always under the condition that this derogation will not dis-proportionally harm the objectives of EU law. As stated by *Torres Pérez* the CJEU should not automatically resort to primacy and effectiveness of EU law, but it should consider allowing national provisions more protective towards fundamental rights to apply. This does not mean that national courts will be free to discard EU law whenever national standards are higher. It should be for the Court of Justice of the European Union to evaluate every case individually and strike the correct balance among the various rights and interests<sup>90</sup>. Adopting a more pluralistic approach and advancing judicial dialogue does not mean that the CJEU gives up its authority, or restructures the form of the European legal order, it does not have the authority to do so. The Court in that way makes it possible for the national courts to play their role and contribute to the achievement of a European consensus in the field of fundamental rights. This interpretation of Article 53, that views this provision as a reflection of pluralism in the field of fundamental rights, can be enhanced through a combined reading of Article 53 with Article 52 (4) of the Charter and Article 4 (2) of the Treaty on European Union which states the Union's duty to respect the national and constitutional identities of the Member States.

As the scope of EU law expands, moving forward to an ever closer union, the areas of law that are harmonized across the Union will increase. If the national interpretation of fundamental rights can not be expressed and allowed to contribute to the shaping of a common European approach, then the final result might be homogeneous, but it will not be a concept achieved after the interaction of the constitutional traditions of the Member States.

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<sup>90</sup> Ibid, p. 327, 328.

## Epilogue

The interpretation of Article 53 that the Court of Justice provided is a step forward. The Court recognized the pluralistic nature of EU law in the area of fundamental rights and at the same time established that the principle of primacy of EU law will not be compromised. The problem is that the national courts can invoke their constitutional interpretations of fundamental rights and apply their higher national standards of protection, only in areas of law where the actions of the Member States are not fully dictated by EU law. This leaves them with a secondary role in the discussion for fundamental rights in the European legal order, especially if we consider that as the scope of EU law is expanding, the legal field where national courts can apply their national standards becomes narrower. This is not in line with the ideas of pluralism and judicial dialogue, and clearly shows that the main priority of the CJEU is to safeguard the primacy of EU law.

In its core this is a democratic problem and it should not be just up to the Court to resolve it. The Court does not decide how the Union will move forward with European integration. It is for the political authorities, the Member States' governments and the European institutions to make sure that the interpretation of fundamental rights in the European level will be an endeavor shared by the CJEU and the national courts, and that the democratic principles and the constitutional identities of the Member States will be respected and taken into account.

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